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CIA Threat to Use Obscure Law Over Leaks Scrutinized

Media Ready Defense

By CHARLEY ROBERTS

WASHINGTON — CIA Director William Casey has media attorneys and Justice Department lawyers poring over dusty law books and musty legislative histories trying to determine whether he can make good on his threat to see The Washington Post prosecuted if it publishes a story concerning U.S. intelligence-gathering capabilities.

So far, the consensus among those lawyers is that the rarely used espionage statute referred to by Casey in meetings with Post editors and Justice Department officials does apply to the press.

"But the hard question," said the Post's counsel, Boisfeuillet Jones, "is not whether we are covered (by the statute) but whether the story causes damage." The Post will have to weigh the competing public and national security interests, he said.

Leonard Downie Jr., the Post's managing editor, said the newspaper's attorneys are researching the law to determine whether the story would violate national security. "The statute and the legislative history indicate (the law) does apply, but we believe it shouldn't." No decision has been made on when, or if, the story will run, he said.

Meanwhile, Patrick Korten, a Justice Department spokesman, said criminal division lawyers are preparing their recommendation for Attorney General Edwin Meese in the event the Post decides to publish. Beyond that, department officials were observing a "strict no-comment order" on the matter. The CIA was similarly silent.

The statute getting all of this sudden attention is section 793 of Title 18 of the U.S. Criminal Code. Adopted in 1950, as part of Congress' revisions to the Espionage Act of 1917, the section has seen little use.

Casey sent lawyers scrambling to their law libraries when he met in separate meetings on May 2 with Deputy Attorney General Lowell Jensen and Post editors Benjamin Bradlee and Downie.

He reportedly told Jensen that five news organizations had violated the statute, which prohibits "knowingly and willfully" communicating, furnishing, transmitting or "publishing" any classified information concerning "communication intelligence activities of the United States or any foreign government."

Libya Cables Cited

In his meeting with Bradlee, the Post's executive editor, and Downie, Casey reportedly named the five organizations as the Washington Post, Newsweek, The Washington Times, The New York Times, and Time magazine. He cited news reports in the Post and Newsweek on messages intercepted by the U.S. between the Libyan capital and its embassy in East Berlin. And he warned that the Post editors that they might be prosecuted if they published a story purportedly in the works about U.S. intelligence capabilities.

The possibility of actually using the statute increased last week when White House spokesman Larry Speakes said "anyone who violates the law should be prosecuted," and added that a decision whether to prosecute would be left up to the Justice Department. And Sen. David Durenberger, R-Minn., chairman of the Senate Select Committee on Intelligence, said Casey "has a right to drag out this dusty old statute and say this has got to be brought to a halt."

The statute carries a maximum punishment of 10 years in prison and a \$10,000 fine. But it has never been used against a news organization.

A celebrated instance in which the statute was used was the trial of Christopher Lee Boyce, who copied secret intercepts from a code vault in Redondo Beach and sold the information to Soviet agents in Mexico City. He was convicted in 1977 and sentenced to 40 years in prison.

The statute also surfaced in the confirmation hearings of former New York Times reporter Richard Burt to be assistant secretary of state.

Other Disclosures

Sen. Orrin Hatch, R-Utah, a member of the Senate Intelligence panel, questioned whether anyone could be prosecuted under section 793 if Burt were confirmed to the position. Burt had written a story that disclosed the existence of a satellite intelligence system with a listening post in Norway.

But Secretary of State George Schultz said at the time that the person leaking the material, not the one publishing it, should be prosecuted. Burt was confirmed.

A more recent case, involving former naval intelligence analyst Samuel Loring Morrison, was prosecuted under section 793 of the act, and has no bearing on the present controversy, according to First Amendment attorneys.

But, according to one media attorney who asked not be identified, shortly before Morrison was indicted, CIA Director Casey presented proposed legislation to the White House to make it a crime to disclose secret information without a showing of harm or the receipt of payment. Casey purportedly argued that the current statutes were insufficient to deal with security leaks. But the White House declined to push the proposal, said the attorney.

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The CIA declined to comment on the matter.

Even if the government should decide to prosecute, media attorneys and legal scholars believe there are plenty of defenses available.

Benno Schmidt Jr., a professor and former dean of the Columbia University law school, said a news organization could defend itself under the First Amendment as publishing material relative to a matter of public debate as well as raising a challenging the classification of the material as secret.

Bruce Sanford, the First Amendment counsel for the Society of Professional Journalists, Sigma Delta Chi, said a prosecution under the statute would lead to an "Alice in Wonderland" situation in this case. He said that President Reagan himself revealed material from several of the messages cited by Casey in the Post and Newsweek articles when he delivered a televised address to explain why U.S. aircraft had bombed Libya on April 14.

Sanford said that allowing the president, in effect, to declassify the information and then reclassify it secret and prosecute news organizations for publishing it would never pass constitutional muster.

Schmidt, who published an article in 1973 on the communication intelligence statute involved here, pointed to another potential defense: "implied authority" to publish the material if the "leak" came from some high government official or the material could be shown to have been in the public domain.

A Reminder to the Media?

Sanford said he believes there will not be any prosecution, whether or not the Post publishes its story. He believes Casey's warning was simply the CIA's latest effort to remind the media and government officials that leaks can hamper intelligence gathering.

Over the past five years, he said, the Reagan administration has tried to do that symbolically through various actions, such as the Morison case and the recent firing of an assistant undersecretary of defense who allegedly gave reporters information about a decision to give Stinger missiles to rebel forces in Angola and Afghanistan.

But a prosecution of a news organization under this statute would be a mistake, said Sanford. And that is probably not what Casey intended.

"In the intelligence world," said Sanford, "Not all is what it seems. And Casey is steeped in the intelligence world."
